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Promoting reconciliation, accountability and human rights in Sri Lanka

Report of the Office of the United Nations High Commissioner for Human Rights

Summary

Pursuant to Human Rights Council resolution 34/1, the present document is an update on progress made in the implementation of resolution 30/1 on promoting reconciliation, accountability and human rights in Sri Lanka during the period from March 2017 to January 2018, in particular with regard to the Government's commitment to put in place transitional justice measures. In the present update, the Office of the United Nations High Commissioner for Human Rights also looks at the general human rights situation in the country, including with respect to accountability.

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Contents

		Page
I.	Introduction	3
II.	Engagement of the Office of the United Nations High Commissioner for Human Rights and United Nations human rights mechanisms	3
III.	Developments in reconciliation and accountability	4
	A. Overall developments in transitional justice	4
	B. Preconditions for transitional justice and confidence-building measures	6
	C. Emblematic cases	7
IV.	Other human rights issues	8
V.	Conclusions and recommendations	9

I. Introduction

1. The present document is an update on progress achieved in promoting reconciliation, accountability and human rights in Sri Lanka. It is submitted pursuant to Human Rights Council resolution 34/1, which followed the adoption of resolution 30/1. Both resolutions were co-sponsored by Sri Lanka, and were adopted by consensus. It provides an update to the comprehensive report of the United Nations High Commissioner for Human Rights to the Council at its thirty-fourth session (A/HRC/34/20).[1]

2. In its resolution 34/1, the Council took note with appreciation of the High Commissioner's report and requested the Government of Sri Lanka to implement fully the outstanding measures identified by the Council in its resolution 30/1. It also requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) and relevant special procedure mandate holders, in consultation with, and with the concurrence of, the Government of Sri Lanka to strengthen their advice and technical assistance on the promotion and protection of human rights and truth, justice, reconciliation and accountability in Sri Lanka. In the same resolution the Council also asked OHCHR to continue to assess progress in the implementation of its recommendations and other relevant processes related to reconciliation, accountability and human rights in Sri Lanka, and to present a written update to the Council at its thirty-seventh session and a comprehensive report, followed by a discussion on the implementation of Council resolution 30/1, at its fortieth session.

3. In the present report OHCHR reviews progress made by the Government of Sri Lanka during the period from March 2017 to January 2018 on the implementation of resolutions 30/1 and 34/1, in particular regarding the comprehensive recommendations on the judicial and non-judicial measures necessary to advance accountability and reconciliation, and on strengthening the protection of human rights, democracy and the rule of law. The update is based on public information and insights obtained by OHCHR from various governmental and non-governmental stakeholders.

II. Engagement of the Office of the United Nations High Commissioner for Human Rights and United Nations human rights mechanisms

4. Several senior OHCHR representatives conducted visits to Sri Lanka during the period under review, following the missions of the High Commissioner and the Deputy High Commissioner in February and September 2016, respectively. The High Commissioner also had the opportunity to meet the President of Sri Lanka on 22 September 2017, during the seventy-second session of the General Assembly, and to exchange views with high-level delegations from Sri Lanka during the thirty-fifth session of the Human Rights Council in June 2017 as well as in bilateral meetings. The High Commissioner welcomes the substantive engagement of the Government with OHCHR and its constructive engagement with United Nations human rights mechanisms.

5. Since the previous report, the Government has hosted the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Working Group on Arbitrary Detention. The observations and recommendations of these mandate holders were used to inform the present update in conjunction with the reports of the other special procedure mandate holders who visited the country between 2015 and 2017.

6. In November 2017, Sri Lanka underwent its third universal periodic review, which has also informed the present update.

[1] Sinhalese and Tamil versions of the findings are available at www.ohchr.org/EN/Countries/AsiaRegion/Pages/LKIndex.aspx.

7. Welcoming the efforts made by the Government to continue to engage with the special procedures and the treaty bodies, the High Commissioner reiterates the call on the Government to set out a clear plan of action to implement the key recommendations of these human rights mechanisms. On 5 December 2017, Sri Lanka acceded to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a step in the right direction towards strengthening efforts to prevent torture. The Cabinet of Ministers has identified the Human Rights Commission of Sri Lanka as the national preventive mechanism for the purpose of compliance with the Optional Protocol.

8. OHCHR continued to provide the Government with technical assistance through its presence in Sri Lanka and the deployment of expert missions. It also provided financial and technical support to the archiving and dissemination of the materials of the 2016 national consultations and the domestic screening processes for military personnel to be deployed in peacekeeping operations. OHCHR also provided advice on the review of the counter-terrorism legislation. OHCHR continued advising on various aspects of transitional justice, including through the United Nations Peacebuilding Fund, in coordination with the United Nations country team and the Resident Coordinator. OHCHR continued to work closely with the Human Rights Commission of Sri Lanka and civil society organizations.

III. Developments in reconciliation and accountability

A. Overall developments in transitional justice

9. In resolution 30/1, the Human Rights Council expressed support for the commitment by the Government of Sri Lanka to implement a comprehensive transitional justice agenda that would include the establishment of an accountability mechanism, truth-seeking, reparation programmes and institutional reforms. Through resolution 34/1, the Council granted the Government two additional years to demonstrate progress. While acknowledging that transitional justice processes may need longer periods to fully conclude their identified goals and outcomes, the structures and legislative framework for them to function could realistically have been put in place within a 2 1/2-year time frame.

10. The High Commissioner notes that while the institutional architecture has been established only incipiently to take the transitional justice process forward during this time frame, concrete results have yet to be delivered.

11. In a positive step, in October 2017, the mandate of the Secretariat for Coordinating Reconciliation Mechanisms was extended until March 2019.[2] While recognizing that this entity has acquired expertise and knowledge, it is of concern that neither it nor the Office for National Unity and Reconciliation[3] have significantly grown in strength or resources since the High Commissioner's previous report, of March 2017. The several technical working groups tasked with drafting blueprints for the accountability and reconciliation mechanisms were dismantled after submitting their initial drafts, and the results of their efforts have not been made publicly available. The new Interministerial Coordination Committee put in place last year has met only once. A committee of senior officials has been established under the Interministerial Committee and reportedly holds regular meetings.

12. A comprehensive transitional justice strategy, including a clearly defined timeline for implementation, has yet to be made publicly available and consulted. The report of the Consultation Task Force on Reconciliation Mechanisms, one of the few positive elements highlighted in the previous reports of the High Commissioner, has not yet been endorsed or officially reviewed by the Government or the Parliament. It is of concern that the implementation of these important commitments remains pending.

[2] See www.scrm.gov.lk.
[3] See www.onur.gov.lk.

13. The High Commissioner welcomes the gazetting of the Office of Missing Persons on 15 September 2017 and progress towards its operationalization, after long delays following the adoption of the original legislation in August 2016. This is the first transitional justice mechanism to be established. Moreover, the allocations in the 2018 national budget indicate that this body will be properly resourced to start operations. As at 15 January 2018, the process of selection and appointment of the commissioners was ongoing.

14. It is to be seen if the new institution will be able to overcome the distrust and frustration that has festered among civil society and victims' groups, particularly in the North, as a result of the multiple delays, amendments and insufficient consultation with respect to the legislation establishing the Office of Missing Persons. An independent and well-resourced Office, with capable, trustworthy and impartial commissioners, appropriate protection mechanisms for victims and witnesses and a clear policy on gender sensitiveness, has the potential to provide a new impetus to the protracted transitional justice process, including the creation of the remaining three mechanisms. An enabling environment will be essential for commissioners and staff, the families of victims, witnesses and civil society aiming to contribute to the objectives of the Office without the risk of reprisals or other threats.

15. The ratification by Sri Lanka of the International Convention for the Protection of All Persons from Enforced Disappearance on 25 May 2016 has yet to be translated into domestic legislation. The enabling legislation was tabled in Parliament on 5 July 2017 and again on 21 September, but the debate was postponed on both occasions. As expressed in the previous reports of the High Commissioner, it is crucial that this legislation be enacted by the time the Office of Missing Persons becomes functional.

16. Progress in the design of a truth and reconciliation commission and of a reparation programme cannot be properly assessed until the Government unveils the drafts prepared by the technical working groups and opens public consultations and discussion on them. OHCHR understands that the proposals of the technical working groups are currently under review.

17. Legislation establishing a truth commission must not be further delayed as it is a key tool for uncovering patterns of serious violations, creating a demand for accountability and fostering consensus around a non-partisan view of victimhood that recognizes that victims of the conflict come from all communities. While the Office of Missing Persons will hopefully contribute to realizing some aspects of the right to truth, only a truth commission with a broad temporal and material scope can attempt to construct a comprehensive narrative that addresses the multiple layers of serious violations and provides sound answers on the number of victims and the root causes of the conflict.

18. Reparations, irrespective of the format they take, must be accompanied by an acknowledgement of responsibility that differentiates them from ordinary State responses to social needs. The victims of serious human rights violations and abuses should be acknowledged and provided reparations as such, both individually and collectively, including through memorialization and restitution of rights and property, and with clear links to other elements of truth, accountability and non-recurrence. Reparations should be granted on the basis of having suffered a violation, irrespective of the affiliation of the perpetrator and without discriminating among victims on account of their ethnicity, regional origin, religion or any other factor. Gender aspects should be given particular consideration when developing reparation programmes.

19. With respect to accountability, there has been very little preparatory work for the judicial mechanism envisaged in resolution 30/1. Crimes under international law have not been incorporated into domestic law to allow for their prosecution, and few consistent efforts have been made to strengthen the forensic, investigative and prosecutorial capacities in Sri Lanka. It is critical that the Government move forward in creating these preconditions while at the same time designing the special court and its procedures.

20. For the first time, the 2018 national budget contains a dedicated section related to reconciliation, including allocations for the establishment of the Office of Missing Persons, the resettlement of internally displaced persons, implementation of the Official Language

Policy, the Secretariat for Coordinating Reconciliation Mechanisms and special programmes to address the needs of war- and conflict-affected widows and ex-combatants in the Northern and Eastern Provinces and to support differently abled women, among others.

21. On 21 September 2017, the Prime Minister presented the interim report of the Steering Committee on Constitutional Reform. This is a step towards the implementation of commitments under resolution 30/1 "on the devolution of political authority, which is integral to reconciliation and the full enjoyment of human rights by all members of its population" (para. 16).

22. The Human Rights Commission of Sri Lanka has continued to work in an independent and competent manner. Thorough and outspoken, it has shown the potential of independent institutions to strengthen the system of protection of human rights. Its participation in the process leading to the establishment of a domestic screening process for potential United Nations peacekeepers has been a positive example of cooperation between State institutions, without compromising independence or commitment. The High Commissioner reiterates the need for all parts of the Government to support independent commissions and fully respect their independence.

B. Preconditions for transitional justice and confidence-building measures

23. Concerns expressed in the previous reports of the High Commissioner with regard to the protection of victims and witnesses persist. The partial review of the Assistance to and Protection of Victims of Crime and Witnesses Act of 2015, which included consultations with stakeholders in the form of a call for submissions, is positive but insufficient to address the significant shortcomings of the legislation with respect to cases involving State agents. On 7 November 2017, an amendment bill was passed in Parliament, but the only important innovation it brings is that Sri Lankan expatriates can now give evidence through Sri Lankan missions in their countries of residence. The High Commissioner reiterates the urgent need to review the Act in order to incorporate strong safeguards to ensure that an effective system of protection is available to victims and witnesses. This is particularly important in the framework of the transitional justice agenda which may require specific protection mechanisms.

24. A pending crucial confidence-building measure and a key commitment of the Government is the review and repeal of the Prevention of Terrorism Act. Draft legislation in the form of a counter-terrorism act was approved by the Cabinet on 25 April 2017. The visit of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in July 2017 provided opportunities to discuss shortcomings in the draft act, and the Government has engaged in discussions with various experts. The High Commissioner encourages the Government to take the recommendations received into account to improve the text and to engage in public consultations with civil society and other stakeholders on the draft legislation. He also urges the Government to promptly repeal the Prevention of Terrorism Act and not necessarily wait for the replacement legislation to be finalized, as the ordinary criminal procedure framework should provide enough tools to handle investigations in the interim.

25. According to information provided by the Government, as of 18 January 2018, the cases still pending under the Prevention of Terrorism Act involved 72 persons on remand, 11 persons pending indictment after completion of investigations and 61 persons with indictments before the high courts. According to the Government, since the previous report of the High Commissioner, the Act has not been applied in new arrests.

26. The restitution of land held by the military in the Northern and Eastern Provinces is still incomplete. The harbour of Myladi and 54 acres of land were released on 3 July 2017 for fishing purposes after a 30-year ban, and in total 842 acres of private land and 4,318 acres of State land were released between January and December, according to government figures. Government plans indicate the need for the security forces to retain 36,002 acres (of which 5,327 acres are private land).

27. While the High Commissioner recognizes the significant amount of land returned (about 70 per cent of the land held in 2009 has been returned, according to government figures), the full extent of land under military occupation claimed by civilians remains in question. The High Commissioner still considers that the military should only retain land when it is strictly necessary for security purposes, and upon payment of proper compensation. The determination of both the need and the compensation should be achieved through independent procedures.

28. In accordance with the process agreed between the United Nations and the Government of Sri Lanka, and consistent with the Policy on Human Rights Screening of United Nations Personnel, the Sri Lankan military personnel nominated to be deployed to serve with the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) underwent stringent screening processes by the United Nations. The review conducted by the United Nations aimed at, and ensured that, in accordance with the information available to it, none of the approved nominees had had direct or indirect involvement in human rights violations. After completion of the review, the deployment of a combat convoy company to MINUSMA took place on 24 December 2017. Following the oral update by the High Commissioner to the Human Rights Council on 29 June 2016, pursuant to resolution 30/1, the United Nations supported the establishment and strengthening of a national screening mechanism hosted by the Human Rights Commission of Sri Lanka. The Commission will undertake domestically the screening of Sri Lankan military personnel for future deployments as peacekeepers.

C. Emblematic cases

29. The authorities have not yet demonstrated the capacity or willingness to address impunity for gross violations and abuses of international human rights law and serious violations of international humanitarian law. The following paragraphs provide a short overview of a limited number of emblematic cases.

30. The death of 27 inmates during a security operation at Welikada prison in November 2012 (see A/HRC/25/23, para. 24) has not yet been fully addressed, and threats and attacks against a key eyewitness to the killings and a lawyer appearing in the case have not been clarified. In an action before the Court of Appeal in April 2017, the State reported that a fresh inquiry had been initiated and had been given until 6 February 2018 to report on the status of the investigation.

31. In May 2017, an army brigadier general and three other officers were arrested in connection with the killing of protestors by army personnel during a demonstration over access to clean water in Weliweriya in August 2013. The brigadier general and a sergeant were released on bail on 31 August 2017.

32. Twelve years after the killing of 5 students in Trincomalee in January 2006 and of 17 humanitarian workers of the non-governmental organization Action contre la faim, in Muttur in August 2006, no noticeable progress has been made in ensuring accountability. However, legislative changes now allow witnesses in judicial cases to provide evidence remotely from outside Sri Lanka, and the Government has reportedly taken steps to facilitate this option with respect to at least one of these cases.

33. On 12 July 2017, a former commodore and navy spokesperson was arrested in connection with investigations into 11 cases of disappearances that occurred in 2008 and 2009. In total, six navy officers were detained on remand in connection with the case. Reportedly, a key suspect is still at large. On 9 January 2018, the six remanded suspects were released on bail.

34. Following the acquittal on 24 December 2016 of the five defendants on trial for the murder of Member of Parliament Nadarajah Raviraj in November 2006, an appeal was filed in January 2017 on behalf of the aggrieved party as well as by the State. Both cases have been heard together. However, one of the accused-respondents failed to appear in court.

35. With regard to the disappearance of journalist Prageeth Eknaligoda in January 2010, there has been no apparent progress in the case since the release on bail of all 13 suspects on different dates in 2016. The next court hearing is set for 6 February 2018.

36. The appeal against the acquittal of all accused in connection with the Killiveddy (or Kumarappuram) massacre of 23 Tamil civilians by soldiers in 1996 was ongoing as of December 2017. The Court of Appeal is to receive the objections of the respondents on 14 March 2018.

37. The killing of journalist Lasantha Wickrematunge in January 2009 has remained under investigation. After the suicide and posthumously discovered confession of an alleged perpetrator in 2016, a second post-mortem report (August 2017), following the exhumation of Lasantha Wickrematunge's body in August 2016, contradicted previous findings on the cause of death. All suspects remanded in this case have been freed on bail. On 18 January 2018, the police Criminal Investigation Department told the magistrate that their investigation had uncovered an alleged attempt by members of other police services to destroy evidence. Further inquiry is scheduled for 15 March.

38. On 28 August 2017, several Latin American human rights groups, coordinated by an international non-governmental organization, filed criminal complaints in Brazil and Colombia, under the universal jurisdiction doctrine, against the then Ambassador of Sri Lanka to countries in the region, retired Army General Jagath Jayasuriya, for war crimes and crimes against humanity allegedly committed in the final phase of the civil war, in 2009. The ambassador completed his tenure in the region and returned to Sri Lanka on 30 August.

39. An overall trait of the Sri Lankan justice system is the perceived double standards in the administration of justice with regard to treatment of State officials or security personnel accused in criminal proceedings. A case not related to human rights violations but that illustrates the contradictions of the criminal justice system is the conviction, on 7 September 2017, of a former presidential secretary and a former director general of the Telecommunications Regulatory Commission in a corruption case. Within hours of their entry into prison, both convicted officials had been relocated to the prison hospital, reportedly for health reasons. Ordinary convicts often complain of the difficulties they encounter in receiving medical treatment in prison, even for easily verifiable or urgent problems such as infections. On 20 September, the two convicts were released on bail "under exceptional circumstances" by a Colombo High Court judge, after having served only 13 days of their 3-year prison term. This is exceptional in a system where suspects are often held on remand awaiting trial for up to 10 years (and even longer in cases under the Prevention of Terrorism Act).

40. As mentioned in the previous reports of the High Commissioner, the failure to show major progress in these emblematic cases strengthens the argument for the establishment of a specialized court to deal with the most serious crimes committed by State actors in the context of conflict, including gross violations of human rights and other crimes under international criminal and humanitarian law, staffed by specialized personnel and supported by international practitioners. In October 2017, the Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence commented that the case against a Sri Lankan general filed in Brazil would likely be "the tip of the iceberg", and that many similar cases could emerge in the absence of a credible domestic solution to the problem of impunity for serious human rights violations. The High Commissioner agrees with this assessment and insists on the need for such an accountability mechanism to be promptly operationalized. For this mechanism to be credible and trusted by victims, it would require a substantial degree of external support. In the absence of such a mechanism, OHCHR calls on Member States to exercise universal jurisdiction when required.

IV. Other human rights issues

41. While the situation of human rights in Sri Lanka has improved overall since January 2015, there have been fewer signs of progress since the previous report of the High Commissioner. Several incidents targeting religious minorities, slow government reaction

and response to some of those incidents and the controversial statements of some (then) key ministers have eroded the Government's image of being fully committed to improving the human rights situation.

42. The national human rights plan of action for the period 2017–2021, approved by the Cabinet in January 2017, was made public on 1 November. The plan is a welcome step forward, and the Government should ensure its full implementation.

43. The High Commissioner remains gravely concerned that, 2 1/2 years into a reconciliation process, his Office continues to receive reports of harassment or surveillance of human rights defenders and victims of human rights violations. The preconditions of trust and confidence that are needed for a reconciliation agenda to succeed are incompatible with intrusive, and likely unnecessary, surveillance of activists. While the High Commissioner has repeatedly been assured that those incidents were not consistent with the Government's policy, the inability to fully eliminate such practices is alarming. During the period under review, at least two incidents escalated to physical violence against the activist being threatened or kept under surveillance.

44. The use of torture remains a serious concern. The High Commissioner was deeply concerned over serious allegations in foreign media about ongoing abductions, extreme torture and sexual violence, as recently as in 2016 and 2017. OHCHR is exploring options for how best to pursue further investigations of these allegations. The High Commissioner is encouraged by the strong condemnation by the Government of any act of torture, and its assurance that allegations of torture will be properly investigated and prosecuted to the full extent of the law.

45. The High Commissioner is especially concerned with regard to multiple incidents of intercommunal violence, attacks and hate speech against minorities during the course of 2017. They included a series of petrol-bomb attacks against mosques and businesses owned by Muslims across the country around May (more than 30 registered incidents, with a peak of nearly daily attacks during the two first weeks of the month). The attacks were accompanied by anti-Muslim rhetoric from Sinhala-Buddhist ultranationalist groups and came at around the time the leader of one of these groups (Gnanasara Thero, of Bodu Bala Sena) was awaiting sentencing on a contempt of court charge. On 13 June, the Cabinet issued a statement condemning violence against minorities, noting that "inciting violence against fellow citizens of various ethnic [and] religious backgrounds has no place in Sri Lankan society".

46. On 26 September 2017, a mob led by Buddhist monks reportedly belonging to the organization Sinhalese National Force demonstrated against the presence of Rohingya refugees in Sri Lanka in front of a house in Mount Lavinia, Colombo, where 31 Rohingyas (mostly women and children) from Myanmar were being sheltered by the Office of the United Nations High Commissioner for Refugees and its partner organization, Muslim Aid. Despite police presence, the house was stormed by the crowd and the group of Rohingyas had to be relocated for their protection. In a separate incident, tensions between the Tamil and Muslim communities in Batticaloa led to a temporary local boycott of Muslim businesses in November. In the worst incident of the year, in Gintota (Southern Province), on the evening of 18 to 19 November, more than 70 Muslim homes and businesses were damaged by a mob that formed after an incident arising from a traffic accident involving Sinhalese and Muslim youths. Hate speech over social media, possibly politically motivated, seemed to play a role in the incident. Unlike during the incidents in May, in Gintota, the Government's response was swift, including deployment of special police units and temporary curfews. The Prime Minister visited the site of the crimes and stated that such acts of violence, and incitement to such crimes, had no place in Sri Lanka and would be prosecuted to the full extent of the law. Nineteen alleged perpetrators were arrested and detained.

47. Meanwhile, attacks on Evangelical Christians continued to be recorded. A prominent lawyer and human rights activist who had provided figures on the number of such attacks in a television debate in May 2017 was publicly threatened by the then Minister of Justice with disbarment for making such claims.

V. Conclusions and recommendations

48. **The High Commissioner reiterates his appreciation for the constructive engagement of the Government of Sri Lanka with OHCHR and United Nations human rights mechanisms since January 2015. However, as he noted in March 2017, this constructive collaboration must be accompanied by the implementation of key commitments. The fulfilment of the transitional justice commitments made under Human Rights Council resolution 30/1 has been virtually stalled for more than a year. Progress with some confidence-building measures has often been insufficient and inconclusive, and the structures set up to coordinate implementation have not consolidated enough or did not receive sufficient political support to move things forward.**

49. **In statements and reports issued since 2015, the High Commissioner, while expressing concern over the lack of progress on accountability and reforms, was encouraged by the positive improvement of the general human rights situation. However, 2017 was marked by intermittent inter-ethnic tensions and attacks on minorities which are unlikely to dissipate completely.**

50. **While the Government has managed to steer many of these worrying events in a positive direction, this type of violence in a country that has experienced cycles of extreme violence roughly every 10 years is deeply troubling, particularly when accompanied by hate speech, misinformation and agitation through social media and political manipulation.**

51. **The continuing allegations of torture and surveillance and the lack of sufficient progress in implementing critical confidence-building measures, such as the release of land, the repeal of the Prevention of Terrorism Act and the solution to the pending cases under the Act, have antagonized key constituencies that could be instrumental to the Government's reform efforts.**

52. **The High Commissioner urges the Human Rights Council to continue to play a critical role in encouraging progress in accountability and reconciliation in Sri Lanka. It also calls on Member States to explore other avenues, including the application of universal jurisdiction, that could foster accountability.**